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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

BOARD OF EDUCATION OF THE TOWNSHIP OF BRANCHBURG,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE; WILLIAM L. LIBRERA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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This case presents an issue of fundamental importance to thousands of parents vitally concerned with the education and welfare of their children. After long decades of studied indifference to the interests of these parents, New Jersey embraced a manifestly minimalist approach in providing for token representation of these parents on the school boards that control their children's education. Under the Court's "one person, one vote" principle, however, this simply will not do. Respondents have offered no justification for this manifestly disproportional treatment, nor any reason that elections for these school boards should be treated any differently from other elections to which the "one person, one vote" principle has been applied. In light of the practical and legal significance of this case, the Court should grant certiorari.

A. The Decision Below Is In Tension With This Court's Decision In *Holt*.

1. At the outset, respondents attempt to fabricate a vehicle problem by insinuating that Branchburg is currently capable of severing its send-receive relationship with Somerville. *See* Opp. of William L. Librera (hereafter "State Opp.") 4, 14; Opp. of Bd. of Educ. of the Borough of Somerville (hereafter "Somerville Opp.") 7, 11. These insinuations, however, constitute nothing more than litigation gamesmanship. The Third Circuit noted that "*both parties agree* that Branchburg cannot withdraw from the send-receive relationship in the foreseeable future," Pet. 15a (emphasis added), and relied heavily on that fact in its analysis, *see id.* at 19a-21a. Similarly, in the district court, Somerville freely admitted that "Branchburg has no cause, statutory or otherwise, to terminate the sending/receiving relationship." C.A. App. 318.

It is undisputed that Branchburg has attempted to avail itself of all three of the statutorily provided remedies for school districts seeking to terminate or alter their send-receive relationships. *See* N.J. Stat. Ann. §§ 18A:38-13, 18A:38-21.1. Specifically, Branchburg has unsuccessfully petitioned the Commissioner of Education to withdraw from the send-receive relationship, *see* Pet. 13a; unsuccessfully sought to form a regional school district with Somerville, *see id.* at 14a; and unsuccessfully sought to form a limited-purpose regional school district with Somerville, *see id.* at 15a. In light of Somerville's consistent opposition to Branchburg's efforts to sever or alter the send-receive relationship, *see id.* at 5, and the Commissioner of Education's apparent bright-line refusal to grant severance where students from the sending district constitute more than 25% of the receiving district's high-school population (much less more than 50%, as here), *see* Pet. 14, it is disingenuous for respondents to suggest that Branchburg could now successfully re-petition the Commissioner of Education to withdraw from the send-receive relationship. Indeed, Somerville acknowledged as much before the district court when it conceded that any additional attempts by Branchburg to sever the relationship are doomed to fail. *See* C.A. App. 318.

2. Like their attempt to recharacterize the facts of this case, respondents' efforts to reconcile the decision below with applicable case law are unavailing.

a. As demonstrated in our petition, the Third Circuit's decision is in tension with this Court's pathmarking decision in *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). In the critical portion of *Holt*, the Court, speaking through then-Justice Rehnquist, recognized that the "one person, one vote" doctrine applies to a governmental body that exercises

extraterritorial authority *either* when the body "is exercising precisely the same governmental powers over residents of surrounding unincorporated territory as it does over those residing within its corporate limits," *id.* at 72 n.8, *or* when the body subjects non-residents to "important aspects of state powers," such as the "authority to levy and collect * * * taxes," *id.*

Like the Third Circuit, respondents disregard the Court's discussion of the latter category of cases — either by pretending it does not exist, *see* Somerville Opp. 10, or by claiming that it is mere "dicta," *see* State Opp. 9. In fact, the Court recognized both categories, and this case falls into both of them.

First, it is clear that the Somerville Board exercises "precisely the same governmental powers" over Branchburg's high school students as it does over its own. Like the Third Circuit, respondents contend that the Somerville Board exercises *different* power over its own residents than over Branchburg residents simply because Somerville only controls the education of Branchburg's *high school* students, not that of Branchburg's students in grades K to 8. *See* Somerville Opp. 15; State Opp. 9. As the *amicus* brief filed by Professor Briffault and Judge Gibbons persuasively demonstrates, however, it would be nonsensical to require a school board to exercise control over the *entire* cradle-to-grave education of non-residents before the "one person, one vote" principle could be invoked. *See* Br. of *Amici Curiae* Allamuchy Township Bd. of Educ. *et al.* (hereafter "School Boards Br.") 13-15. Indeed, in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970), this Court applied the "one person, one vote" principle to the election of the board of trustees of a junior college district,

notwithstanding the fact that the board exercised authority only over a two-year, optional degree program, *see id.* at 53. Here, the Somerville Board has plenary authority to determine the curriculum, hire teachers, and manage facilities for Branchburg's high school students — precisely the same power that the Somerville Board exercises over its own high school students, and precisely the same power that the Branchburg Board would exercise if it only could educate its own students itself.

Second, it is equally clear that the Somerville Board subjects Branchburg residents to "important aspects of state powers": namely, the powers to educate and tax. As to education: remarkably, in its brief on behalf of the Commissioner of Education, the State of New Jersey seeks to minimize the importance of the power to educate, suggesting that it is "no more important or critical" than the general police powers at issue in *Holt*. State Opp. 9. However, as we detailed at length in our petition, *see* Pet. 10-12, this Court has long recognized that public education is "perhaps the most important function of state and local governments," *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); *see also Zelman v. Simmons-Harris*, 122 S. Ct. 2460, 2480 (2002) (Thomas, J., concurring) (same). And the Court has routinely applied the "one person, one vote" principle in the educational context — a fact that "reflect[s] the Court's judgment as to the unique importance of education among the functions of modern government." *Ball v. James*, 451 U.S. 355, 372 n.1 (1981) (Powell, J., concurring). It therefore cannot seriously be argued that the authority of localities over education is not an "important aspect of state power;" in applying the "one person, one vote" doctrine to a municipal body that exercises extraterritorial authority, this Court has squarely recognized it as such. *See Evans v. Cornman*, 389

U.S. 419, 424 (1970); *cf. Holt*, 439 U.S. at 76 (Stevens, J., concurring) (listing the "operation of schools" as one of the important powers not exercised by the municipality in that case).

As to taxation: respondents seek to distinguish the discussion in *Holt* itself of the importance of taxation by characterizing the transfer of money from the Branchburg Board to the Somerville Board as mere tuition payments. *See* State Opp. 1; Somerville Opp. 6. In so doing, however, respondents elevate form over substance. As common sense would suggest, and as the Third Circuit found, Branchburg's "tuition" payments to Somerville come directly from Branchburg's tax base. *See* Pet. 12a. Because the Somerville Board has plenary power to establish the rates of "tuition," *see* N.J. Stat. Ann. § 18A:38-19, Somerville effectively has the ability to tax Branchburg residents. In the 2000-01 school year alone, the Somerville Board was projected to collect more than $4.8 million from Branchburg — which amounts to *several hundred dollars* from each of Branchburg's 14,566 residents. *See* Pet. 12a. Again, it cannot seriously be argued that the authority over taxation is not a "vital and traditional" one; again, this Court has recognized it as such. *Holt*, 439 U.S. at 72 n.8; *see also Ball*, 451 U.S. at 366 (same).

In sum, this is plainly a situation in which the residents of Branchburg are "just as interested in and connected with electoral decisions as * * * their neighbors." *Holt*, 439 U.S. at 72 n.8 (quoting *Evans*, 398 U.S. at 423) (internal quotation marks omitted). The Third Circuit's decision is in tension with *Holt*, and certiorari is warranted.

b. Moreover, the Third Circuit's decision is inconsistent with the Sixth Circuit's decision in *Mixon v. Ohio*, 193 F.3d

389 (6th Cir. 1999). Although respondents gamely attempt to explain away *Mixon*, *see* State Opp. 10; Somerville Opp. 12, *Mixon* states without qualification that legislation concerning the extraterritorial exercise of authority by a governmental entity is *always* subject to rational basis review, *see* 193 F.3d at 405. And in an earlier case, *Duncan v. Coffee County*, 69 F.3d 88 (1995), the Sixth Circuit similarly reasoned, again without qualification, that non-residents had no right to vote in a neighboring school district election "because they simply [did] not live" in the district, *id.* at 94. Unlike the Third Circuit, the Sixth Circuit therefore appears to recognize *no* situation in which the "one person, one vote" principle applies to a governmental body that exercises extraterritorial authority. Like the decision below, the Sixth Circuit's decision in *Mixon* is in tension with this Court's decision in *Holt*. The Sixth Circuit's jurisprudence merely points up the uncertainty generated by *Holt* as to the application of the "one person, one vote" doctrine in the extraterritorial context — uncertainty that this Court should resolve by granting certiorari here.

3. Finally, the State of New Jersey makes the desperate and extraordinary suggestion that, to the extent that Branchburg parents do not want to leave control of their children's education in the hands of the Somerville Board, they should simply enroll their children in private schools or educate them at home. *See* State Opp. 4. Similarly, we suppose, the residents of one of the underrepresented districts in *Baker v. Carr*, 369 U.S. 186 (1962), could simply have moved into one of the overrepresented districts. At the outset, even if particular parents were to withdraw their children from Somerville High School, the constitutional problem would not go away, since those parents would still be required effectively to pay taxes to the unaccountable Somerville Board. More fundamentally, however, this Court has routinely applied the "one person, one vote"

doctrine in the context of elections relating to public education, notwithstanding the fact that States could choose not to have elected school boards (or not to provide public education in the first place), much less the fact that students could choose not to attend those schools. *See Hadley*, 397 U.S. at 50; *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969). New Jersey's proposed "solution" is nothing less than a tacit recognition of the weakness of its case. This Court should grant certiorari and apply strict scrutiny to the New Jersey scheme.

B. The Question Presented Is A Recurring Question Of Exceptional Importance.

1. Respondents repeatedly attempt to play down the significance of this case to the residents of New Jersey. *See, e.g.*, State Opp. 15; Somerville Opp. 18. However, as we noted in our petition, *see* Pet. 13, over 215 New Jersey school districts — more than a third of the districts in the State — are currently in send-receive relationships with other districts. As numerous press reports have detailed, many of those districts have been engaged in similar efforts to extricate themselves from send-receive relationships or to obtain greater representation on the boards of receiving districts. *See, e.g.*, Mathew J. Dowling, *Sending Districts Seek Great Presence*, Newark Star-Ledger, Apr. 15, 2003, at A4; *Sending Districts Receive A Boost: Representation Could Increase*, The Record (Hackensack, N.J.), Nov. 17, 2002, at A5; Kimberly Brown, *Sending Districts Winning Larger Say*, Newark Star-Ledger, Apr. 16, 2001, at 9; Sue Epstein; *Bill Would Increase Input From Sending Districts*, Newark Star-Ledger, Aug. 6, 2000, at 37. Indeed, some seventeen sending districts have filed an *amicus* brief in this Court, supporting the petition for certiorari. *See* School Boards Br. 2-3. And the New Jersey School Board Association (NJSBA), an organization composed of delegates

from each New Jersey school board, recently passed a resolution calling for the proportional representation of sending districts on the boards of receiving districts. *See* NJSBA, Positions and Policies on Education, at 4 (Feb. 2003), *available at* http://www.njsba.org/del_assembly/May03/sunset/9300.pdf. Despite numerous proposals, however, sending districts have been unable to obtain relief from the New Jersey Legislature. This Court's intervention is therefore necessary to remedy the endemic underrepresentation on New Jersey school boards.

Moreover, respondents' efforts to suggest that this case does not present a question of great significance to the residents of New Jersey are utterly belied by their own assertions earlier in this litigation. In seeking to have the Third Circuit intervene at an earlier stage of the case, the State of New Jersey acknowledged that "there are * * * other sending-receiving relationships in New Jersey, in which the students of the 'sending' district outnumber those of the 'receiving' district," and concluded that "the holding below will transcend the instant parties and extend to other school districts across the State." C.A. State § 1292(b) Pet. 5. The Somerville Board went even further in emphasizing the importance of this case:

> The matters presented to this Court are momentous. The constitutionality of the statute at issue has importance not only to the parties herein, but also the school boards across the state. In fact, in light of this Court's findings that the voting franchise exists across political lines, the Somerville Board respectfully suggests that this Court's decision has national impact.

D.Ct. Somerville § 1292(b) Brf. 11. Respondents can hardly change their tune merely because they are now defending, rather than attacking, the judgment below.

2. Even if this case were only to affect the residents of New Jersey, this Court's review would be warranted. Where fundamental rights such as the right to vote are involved, this Court has routinely granted certiorari, even when the regulatory scheme being reviewed is unique and therefore no circuit split could exist. *See, e.g.*, *Rice v. Cayetano*, 528 U.S. 495 (2000) (striking down, under Fifteenth Amendment, Hawaii law allowing only "Hawaiians" to vote for trustees of Office of Hawaiian Affairs).

As the Somerville Board itself represented to the Third Circuit, however, this case will have implications not only for the New Jersey send-receive scheme, but also for a wide variety of laws in other States providing for some form of extraterritorial jurisdiction. As the *amicus* brief details, there are literally thousands of "interlocal contracts, joint service agreements, transfers of functions, and other special arrangements for the provision of important local government services" that are potentially subject to this Court's "one person, one vote" jurisprudence. School Boards Br. 4-5. This Court should grant certiorari to clarify the circumstances, if any, under which a municipal body that exercises extraterritorial authority pursuant to these arrangements violates the "one person, one vote" principle. This Court's guidance is needed in this area, and it is needed in this case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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